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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 9

SWIFT & COMPANY, INC., and ARMOUR AND COMPANY,

Appellants,

—v.—

DON J. WICKHAM, Commissioner of Agriculture and Markets of the State of New York,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' BRIEF

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DON J. WICKHAM, Commissioner of Agriculture and Markets of the State of New York,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' BRIEF

Opinion Below

The opinion of the United States District Court for the Southern District of New York is reported in 230 F. Supp. 389 (R. 376-395).

Jurisdiction

This suit was brought under 28 U. S. C. 2281 to enjoin the enforcement of Section 193 of the Agriculture and Markets Law of the State of New York and under 28 U. S. C. 2201 for a judgment declaring this section of New York law

and the regulation promulgated thereunder to be unconstitutional. The judgment of the District Court was entered on June 12, 1964, amended by Order entered July 17, 1964, and Notice of Appeal was filed in that court on August 10, 1964. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b).

Questions Presented

(1) a. Whether the Poultry Products Inspection Act has pre-empted the field of labeling of poultry and poultry products so as to render unlawful the New York Statute and Regulation requiring additional labeling material on the label of stuffed turkey which is not permitted by the Department of Agriculture.

b. Whether the New York Statute and Regulation requiring the weight of the turkey in addition to the weight of the stuffed turkey are in such direct conflict with the Poultry Products Inspection Act, inasmuch as the Secretary has rejected a label showing any other weight statement except the weight of the stuffed turkey, as to render them unlawful under Article VI, Section 2 of the United States Constitution.

(2) Whether the New York Statute and Regulation, requiring a multiple weight statement on stuffed turkeys which is not permitted by the Secretary of Agriculture under the Poultry Products Inspection Act, unlawfully interferes with and obstructs interstate commerce in violation of Article I, Section 8, Clause 3 of the United States Constitution.

(3) Whether the aforesaid New York Statute and Regulation, in their application, deny to appellants the due process and equal protection of law guaranteed to them by the 14th Amendment of the United States Constitution.

(4) Whether, in view of the substantial issues of unconstitutionality of the New York Statute and Regulation under the Supremacy Clause, the Commerce Clause and the 14th Amendment of the United States Constitution as outlined in questions 1, 2 and 3 above, this case was properly heard by a Three Judge District Court pursuant to 28 U. S. C. 2281 and properly in this Court by direct appeal under 28 U. S. C. 1253.

Statutes Involved

The Poultry Products Inspection Act; Sections 81.1, 81.3, 81.7, 81.125, 81.127, 81.130 of 7 C. F. R. are set forth in Appendix A hereto. Section 193 of the Agriculture and Markets Law of the State of New York; and Regulations 221.40 and 221.9(c) of the State of New York.

Statement of the Case

Appellants pack frozen stuffed turkeys in Minnesota and Wisconsin (R. 48, 90). They ship the turkeys into New York for sale to retailers who resell them to consumers (R. 301, 339). These turkeys are labeled so as to show the total net weight of the poultry product, viz., stuffed turkey, as required by the United States Department of Agriculture (R. 110-112). Section 193 of the Agriculture and Markets Law of the State of New York and regulations issued thereunder require a separate statement of the net weight of the tur-

key in addition to the net weight of the whole product (R. 43, 265, 271). Pursuant thereto, appellee, Commissioner of Agriculture and Markets of New York, has taken and threatened to take action that has prevented and will prevent the sale of appellants' stuffed turkeys unless they are labeled in compliance with New York Law (R. 257, 295, 206-207, 312).

In mid-1963 both appellants applied to the United States Department of Agriculture for approval of a label which would satisfy the New York requirement (R. 114, 117, 279-283). In accordance with its long-standing policy against multiple weight statements on combination products, the Department of Agriculture denied these applications (R. 117-121). Appellants did not seek administrative or judicial review of these denials (R. 121).

Appellants brought this action in the United States District Court for the Southern District of New York seeking a declaration of their right to sell stuffed turkeys in New York under the federally approved label and an injunction against appellee's enforcing the New York labeling law. The complaint alleges that Section 193 of the New York Agriculture and Markets Law and the action taken and threatened by appellee under it violate appellants' rights under the commerce and supremacy clauses of the United States Constitution and the due process and equal protection clauses of the Fourteenth Amendment. At appellants' request, the action was heard by a Three-Judge Court pursuant to 28 U. S. C. Section 2281.

The District Court dismissed the complaint and entered judgment for the appellee. The Court found no merit in appellants' contention with respect to the commerce clause

or the claims under the Fourteenth Amendment. With respect to the Supremacy Clause, the Court found no congressional purpose to preempt the field so as to preclude State action with respect to the labeling of poultry products. The Court further found that there was no irreconcilable conflict between the federal act and the New York Statute so as to render the latter invalid. In this connection, the Court held that appellants could, consistent with the federal law, add a supplementary label to their products which would not bear federal approval. Finally, the District Court questioned whether this was properly a case for a Three-Judge Court, but left the issue open suggesting that appellants prosecute simultaneous appeals to the Supreme Court and to the Court of Appeals for the Second Circuit. Both appeals have been filed and the matter is being held in abeyance in the Court of Appeals pending determination of this issue in the Supreme Court.

Summary of Argument

I.

A. Congress, in enacting the Poultry Products Inspection Act, 71 Stat. 441, 21 U. S. C. 451, has preempted the field with respect to the text of labels on poultry and poultry products moving in interstate commerce. That this was the intent of Congress is evidenced by the broad definition of "label" in the Act which includes all written, printed or graphic material on the container, including the consumer package, and accompanying the product. This intent is further demonstrated by the fact that Congress provided for the prior approval of labels by the Secretary of Agriculture before they may be used on a poultry product subject to the

Act. The comprehensive detailed prescriptions with respect to labels which Congress set out in this Act are inconsistent with concurrent state action in the same area. *Cloverleaf Butter Co.* v. *Patterson,* 315 U. S. 148. Therefore, the holding of the District Court that the federal act did not preclude the addition of supplemental information on the label, other than the mandatory information under the Act, is incorrect. This Court has already interpreted language in the Federal Food, Drug and Cosmetic Act, 52 Stat. 1040, 21 U. S. C. 301, substantially identical to the definition of label in this Act, as applying to any material textually accompanying the product. *Kordel* v. *United States,* 335 U. S. 345; *United States* v. *Urbuteit,* 335 U. S. 355. It follows that the prior approval by the Secretary of Agriculture must include all such written, printed or graphic material, whether included in the mandated information or not. The New York regulations require that the weight statement appear on the principal display panel. Since this must, of necessity, be the portion which will bear the federal inspection legend, it is apparent that this information could not be shown on the label without the Secretary's prior approval. The District Court recognized federal preemption with respect to that part of the label which bears the inspection label. Appellants contend that the federal preemption extends to the entire label, as defined in the Act, but even under the District Court's limited definition of label, the New York requirement would not be permitted.

B. The New York Statute and Regulations requiring multiple weights on stuffed turkeys is invalid because it is in direct conflict with the Polutry Products Inspection Act. *Florida Avocado Growers, Inc.* v. *Paul,* 373 U. S. 132. It is impossible for appellants to comply with both federal and state requirements. Stuffed turkeys labeling as required

by New York would not be permitted to be shipped out of appellants' plants in Minnesota and Wisconsin. Stuffed turkeys bearing the federally approved label may not be sold in the State of New York. The additional weight information cannot be ascertained in New York and thus must form a part of the label at the appellants' processing plants. Appellants had a right under the Act to accept the determination of the Secretary of Agriculture when their applications for multiple weight labels on stuffed turkeys were rejected. They were not required to exhaust administrative remedies provided for one who "does not accept" the Secretary's determination, because they did, in fact, accept the ruling. There is no requirement in the law that one must appeal from an administrative determination in order to rely upon it. The Secretary of Agriculture is charged by this statute with the responsibility of seeing that the consumer gets accurate label information. His determinations, as contemplated by Congress, are based upon the expertise and intimate knowledge of the Department of Agriculture of the products and processes of those subject to the Act. The District Court has no warrant or authority in law to substitute its judgment for that of the Secretary, even though the Court might itself have reached a different result in the first instance. *Railroad Commission* v. *Nicholas Oil Co.*, 310 U. S. 573. The Secretary, making his determination that a multiple weight label could be misleading, is entitled to consider factors other than the mere label itself. For example, he may consider the possibility of misleading the consumer if he may buy the same product in different states bearing different labels. He may also consider the potential of misleading the consumer where different products under his jurisdiction show their weights in different ways. He may also consider the impact on the

consumer of information disseminated by television or newspapers bearing labels legal in one state and illegal in another. In any event, the Court has no right to make the determination for him. The Secretary had the right to make the determination he made, the appellants had the right to accept that determination, and the result is an irreconcilable conflict between state and federal law which requires that the state law must yield.

II.

The elaborate detail with which Congress has covered the subject of labeling in the Poultry Products Inspection Act, and its repeated reference to the term "consumer package," demonstrates the intention of Congress to exercise its power over commerce in this area to its fullest extent. Therefore, the states may not impose burdens upon or discriminate against interstate commerce in poultry products in conflict with the statute which Congress passed for the regulation of the subject. *McDermott* v. *Wisconsin*, 228 U. S. 115. Not only do the provisions of the Act itself indicate the broad sweep of the Congressional exercise of power, but the legislative history clearly indicates the desire of Congress to provide for informative labeling and to provide that such labeling, subject to the prior approval of the Secretary of Agriculture, should reach the ultimate consumer of the product itself. The judgments of the Department of Agriculture relating to labeling of poultry products are made in a context of intimate knowledge of the formulation of such products and of the processes by which they are manufactured, together with the advantage provided by the daily presence of federal inspectors in the processing plants. The State of New York,

on the other hand, with none of this background or expertise, seeks to control the labeling of products manufactured in Minnesota and Wisconsin. In so doing, New York has trespassed on an area already governed under the federal commerce power. The state law should be stricken under these circumstances because its enforcement stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Farmers Ed. & Coop. Union* v. *WDAY*, 360 U. S. 525, 535. To permit each state to impose its will with respect to the labeling of federally inspected products would frustrate the purpose of Congress and wreak havoc on the federal program. Such a disruption of a valid federal regulatory scheme is an improper burden on commerce. The requirement of using different labels for different states, the confusion which would exist with respect to the destination of the separately labeled products, the difficulties of providing for television and newspaper advertising, and the cost and burden of labeling separately for separate states—all constitute an unlawful burden upon and interference with interstate commerce.

III.

A. A label approved by a federal agency pursuant to the provisions of a statute of Congress, exercising its power under the Commerce Clause, confers upon the holder thereof a federal right to ship a product bearing that label anywhere in the United States. *McDermott* v. *Wisconsin*, 228 U. S. 115. New York, by its statute requiring a different label has deprived appellants of that right. Furthermore, the New York statute under consideration, by its terms, applies to all combination foods containing meat, poultry or sea food. However, by admission of the New

York official charged with the enforcement of this statute, New York applies this law only against stuffed poultry. Thus, in his enforcement of the New York law, the appellee denies to the appellants due process of the law because he singles them out, as processors of stuffed poultry, for an arbitrary exercise of the powers of government. *Missouri Pacific Railroad Co.* v. *Mackey,* 127 U. S. 205.

B. For the same reason, appellee also denies to appellants the equal protection of law guaranteed to them under the 14th Amendment of the United States Constitution. While the legislative classification may have been a proper one, classification by the executive under delegation of authority should be consistent with the intent of the legislature. *North American Van Lines, Inc.* v. *United States,* 169 F. Supp. 252, cert. den. 359 U. S. 1011. *A fortiori,* the executive has no power to reclassify in the absence of delegation. The constitutional guarantee of equal protection of the laws should be interposed against discriminations that are entirely arbitrary. *Smith* v. *Cahoon,* 283 U. S. 553. According to the testimony of the Director of Weights and Measures of the State of New York, the only distinction made by appellee between stuffed poultry and the other combination products clearly covered by the New York Statute is that he considers enforcement of the one as impractical and of the other, impossible. However, it appears that the *label* requirement is equally possible with respect to all combination products and, indeed, from a weights and measures standpoint, equally impractical. The enforcement of the law with respect to one item and not to other items included within the same legislative classification is arbitrary and capricious and, therefore, a denial of the equal protection of the law guaranteed to appellants by the 14th Amendment. In addition, in its practical effect, the New York law dis-

criminates against out-of-state processors. In light of the federal requirement for a single weight label, only New York processors of stuffed poultry, doing a completely intrastate business, are in a position to comply with the New York law. Therefore, irrespective of its intent, the New York law operates to discriminate against interstate producers and therefore denies to them, of which class appellants are members, the equal protection of law.

IV.

28 U. S. C. 2281 requires the convening of a Three-Judge Federal Court where the relief sought is an injunction restraining enforcement of a state statute on the ground of unconstitutionality. 28 U. S. C. 1253 provides for the direct appeal from an order of such Three-Judge Court directly to the Supreme Court. The complaint in this action sought such an injunction on the grounds of violation of the Supremacy Clause, the Commerce Clause, and the Due Process and Equal Protection Clauses of the 14th Amendment. The District Court essentially left the question open as to whether it properly had jurisdiction as a Three-Judge Court, applying the case, after hearing, against the yardstick of *Kesler* v. *Department of Public Safety of Utah*, 369 U. S. 153. The rule in *Kesler* appears to be that a Three-Judge Court may properly entertain an action where the sole ground of constitutional challenge is based upon conflict with a federal statute only if that conflict is apparent upon the face of the two statutes without the necessity for further statutory interpretation. However, as noted by the Court below, the Supreme Court in *Kesler* actually indulged in a substantial amount of statutory interpretation of both the federal and state acts involved.

Hence, the question appears to be whether or not more statutory interpretation is required than in *Kesler*. This does not appear to be the case because the New York statute in this action is clear, unambiguous and undisputed as to its meaning, whereas in *Kesler* there was substantial controversy as to the policy of the Utah statute involved. Furthermore, it should be noted that the ground of attack in *Kesler* was that of conflict with the federal statute. This is not the case with respect to the present action. This case falls more properly within the rule enunciated in *Florida Lime and Avocado Growers* v. *Jacobsen*, 362 U. S. 73. The burden of the Court's holding in this latter case is that the Three-Judge Court should be convened in any case where an injunction may be granted on the ground of federal unconstitutionality. In that case, the grounds relied upon by the plaintiff were the same as those in the present case. Whether or not a Three-Judge Court should be convened depends upon the averments in the complaint, not upon the determination of the Court after trial. The District Court sought to apply the *Kesler* rule on the ground that, after the hearing, it concluded the other unconstitutional challenges to be insubstantial, although it specifically recognized that they were not such in the pleadings. A careful consideration of the arguments advanced with respect to the Commerce Clause and the 14th Amendment by the appellants in this brief should be enough to sustain the validity of the Court's jurisdiction, even though the Court might conclude that they are not sufficient to sustain appellants' contentions. In any event, it would appear a more proper interpretation of Congressional intent to conclude that the question of jurisdiction of a Three-Judge Court should be determined at the outset rather than at the conclusion of a trial.

ARGUMENT

The New York statute and regulation, in their application, unlawfully invade a field pre-empted by Congress and conflict with a federal statute in violation of Article VI, Section 2 of the United States Constitution.

A. *Pre-emption*

It has long been established that Congress has plenary power over the regulation of commerce between the states under the Commerce Clause of the United States Constitution. The question has given rise to much thorny litigation as to whether or not in a given statute the Congress has chosen to exercise that power in such a way as to "occupy the field" and thus to oust the states from activities which would otherwise by a legitimate exercise of state police powers. Thus, the matter may be one wherein states may not act at all once Congress enters the field. (*Pennsylvania* v. *Nelson,* 350 U. S. 497.) On the other hand, Congressional action may be such as to permit concurrent state action. Whether such action by the states is valid or not will depend upon whether it can exist in harmony with the federal scheme. If it is contrary to or in conflict with the federal statute, the state act must fall. *Campbell* v. *Hussey,* 368 U. S. 297; *Rice* v. *Santa Fe Elevator Corp.,* 331 U. S. 218.

Whether and to what extent Congress has exercised its plenary power over commerce must be determined by a series of alternative tests. First, of course, Congress may use language to indicate its intent that its exercise of jurisdiction in this area shall be exclusive. *Campbell* v. *Hussey, supra.* Second, the nature of the subject matter may be such as to require a uniformity which can only be supplied by

the federal authority. *Morgan* v. *Commonwealth of Virginia,* 328 U. S. 373. Third, the subject matter may be such that both federal and state regulations cannot be enforced without impairing the federal superintendence of the field. *McDermott* v. *Wisconsin,* 228 U. S. 115.

The thread of continuity and consistency running through these various tests lies in the concept that the Court is seeking to determine whether Congress has established such a regulatory scheme as would be inconsistent with concurrent state action in the same area. *Morgan* v. *Commonwealth of Virginia, supra. Cloverleaf Butter Co.* v. *Patterson,* 315 U. S. 148; *Florida Avocado Growers, Inc.* v. *Paul,* 373 U. S. 132.

In enacting the Poultry Products Inspection Act, 71 Stat. 441, 21 U. S. C. 451, Congress devised a broad comprehensive system of inspection and regulation of poultry and poultry products moving in interstate commerce and in major marketing areas. In the preparation of this statute Congress drew heavily upon its experience and the experience of the Department of Agriculture in the Meat Inspection Act, 34 Stat. 1206, 21 U. S. C. 71, and the experience of the Food and Drug Administration in the Food, Drug and Cosmetic Act, 52 Stat. 1040, 21 U. S. C. 301. Thus, the Poultry Products Inspection Act, Section 8, 71 Stat. 444, 21 U. S. C. 457, and the regulations promulgated thereunder (7 C. F. R. 81.127), have adopted the system of prior approval of labels in use under the Meat Inspection Act by the Department of Agriculture for nearly 60 years. The definition of "label" in the Poultry Products Inspection Act combines in one the definitions of "label" and "labeling" found in the Federal Food, Drug and Cosmetic Act (21 U. S. C. 321(k) and (m)). Finally, the

Poultry Products Inspection Act mandates the information which must be contained on a label, both as to shipping container and as to an immediate container, which includes a consumer package. It should be noted that this act provides for compulsory inspection and compulsory labeling.

Thus, it will be seen that Congress, and the Secretary of Agriculture in carrying out its mandate, have devised a very careful, highly detailed and comprehensive scheme of regulation of poultry and poultry products moving in interstate commerce. The labeling provisions of the act are an integral part of this scheme and were seen as necessary to "round out" the system of compulsory inspection (House Report 465, 85th Congress, First Session 1 (1957)).

It is inconceivable that Congress would have made such detailed prescriptions with regard to poultry labels and provided for mandatory prior approval by the Secretary of Agriculture if it had not intended that the labels thus approved were to withstand any modification or supplementation by state action.

Therefore, it is submitted that the Congress has evidenced its intention to occupy the field with respect to the labeling of poultry and poultry products coming under the jurisdiction of the Secretary of Agriculture pursuant to the Poultry Products Inspection Act. If this were not its intent, Congress would not have so carefully provided for prior approval of labels and at the same time adopted the very broad definition of label in the Act. It will be recalled that, in applying the identical language, as it appears in the Food, Drug and Cosmetic Act, this Court has held that "accompanying such product" applies to written matter shipped entirely separately from the product, and even to written matter shipped as long as 18 months after the

interstate journey of the product itself. *Kordel* v. *United States*, 335 U. S. 345, and *United States* v. *Urbuteit*, 335 U. S. 355. Since the Secretary of Agriculture is required by the statute to approve in advance all written, printed or graphic material which "accompanies" the poultry product, in this broad sense of that term, it is hard to conceive how Congress could have more completely occupied the field with respect to the labeling of Poultry Products.

The Court below was of the opinion that the Federal Act and the regulations would not preclude the addition of supplemental information on the label so long as it was clear that such information was not a part of the federally approved label. It even suggested that an additional tag or sticker showing the separate weight required by the State of New York could be added without federal approval (230 F. Supp. at 407). Such an argument seems to ignore the plain meaning of the definition of "label" in this Act as well as the judicial history of that language. As noted above, the definition of label is essentially a combination of the definitions of "label" and "labeling" in Sections 201 (k) and (m) of the Federal Food, Drug and Cosmetic Act, 21 U. S. C. 321, 52 Stat. 1041. It is a well-established principle of statutory construction that when the Supreme Court has construed particular language in one statute, the subsequent use by Congress of the same language in another statute is conclusive evidence of the intent of Congress that the language thus repeated shall have the meaning ascribed to it by the Court.

Applying this principle, the cases of *Kordel* v. *United States*, 335 U. S. 345, and *United States* v. *Urbuteit*, 335 U. S. 355, are dispositive of the District Court's contention.

Additionally, there is no warrant for the District Court's assumption that 7 C. F. R. Section 81.127 is meant to be limited in its application to that portion of the label which contains the mandated information or the inspection mark. This regulation, prohibiting the printing of a label prior to its approval by the Secretary, does not limit or modify the meaning of "label" as defined in the Act. That the Secretary does not recognize any such limitation is clear from the testimony of Mr. Hauver, Deputy Director of the Poultry Division of the United States Department of Agriculture.

Further, in this connection, the Court below suggested without any apparent basis in the record therefor, that New York would be satisfied if the added information appeared anywhere on the label. However, the attention of this Court is called to Section 221.7 of Title I of the Official Compilation of Codes, Rules and Regulations of the State of New York, which reads as follows:

> "221.7 PROMINENCE AND PLACEMENT. All information required by this Part to appear on a container shall be prominent, definite and plain and shall be conspicuous as to size and style of letters and numbers and as to color of letters and numbers in contrast to color of background. The declaration of identity, if required *and the net quantity statement shall appear on the principal display panel.* The name and address of the manufacturer, packer or distributor shall appear either on the principal display panel or on any other appropriate panel. Any required information that is either in hand lettering or hand script shall be en-

tirely clear and equal to printing in legibility." (Emphasis supplied.)

Accordingly, by the very regulation of the State of New York itself, it would be impossible for appellants to add a separate statement of the weight of the turkey anywhere but on the principal federally approved label itself. Under these circumstances, it is fair to assume that even the District Court would agree that this statement would be subject to the prior approval of the Secretary of Agriculture. Indeed, the District Court conceded, at least by implication, that Congress has pre-empted the field with respect to the text of the federally approved label. Agreeing that the Secretary is empowered to construe "net weight" as referring to the weight of the stuffed turkey, the Court said:

> "this alone would not outlaw further statements concerning weight so long as these do not obscure or detract from the force of the federally approved label, and so long as they are not presented so as to imply federal approval." 230 F. Supp. 398, 408.

Since New York by regulation, requires its weight statement to appear on the principal display panel, it is impossible for its additional weight requirements to be stated without implying federal approval.

It is submitted that Congress has occupied the field with respect to the text of the label on poultry products coming within the purview of the Poultry Products Inspection Act. Therefore, New York is precluded from imposing additional requirements in this area. Even under the District Court's limited interpretation of "label," the New York

law improperly invades an area staked out by Congress as exclusively federal.

B. *Conflict*

It is well established that where a state statute conflicts with an Act of Congress, the state statute must yield. Conflicts may be subtle and require an elegant argument to develop. However, no sophisticated rhetoric is needed where a person engaged in interstate commerce cannot comply with both requirements simultaneously. As this Court recently stated, in *Florida Avocado Growers, Inc.* v. *Paul*:

> "A holding of Federal exclusion of State law is inescapable and requires no inquiry into congressional design where compliance with both Federal and State regulations is a physical impossibility for one engaged in interstate commerce, cf. *Union Bridge Co.* v. *United States*, 204 U. S. 364, 399-401, 51 L. ed. 523, 539, 27 S. Ct. 367; *Morgan* v. *Virginia*, 328 U. S. 373, 90 L. ed. 1317, 66 S. Ct. 1050, 165 ALR 574; *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U. S. 520, 3 L. ed. 2d 1003, 79 S. Ct. 962. That would be the situation here if, for example, the Federal orders forbade the picking and marketing of any avocado testing more than 7% oil, while the California test excluded from the state any avocado measuring less than 8% oil content. No such impossibility of dual compliance is presented on this record, however." (373 U. S. 132, 142-143.)

The situation in the case at bar falls precisely within the language of Mr. Justice Brennan, just quoted. It is physically impossible for appellants to comply within both

the federal and the New York State requirements. As testified by Mr. Hauver, Deputy Director of the Poultry Division of the United States Department of Agriculture, dual weights which New York demands would not be allowed out of appellants' plants in Wisconsin and Minnesota (R. 111). Conversely, appellants' stuffed turkeys bearing the label approved by the Department of Agriculture are barred from sale in the State of New York. As has been seen, there is no way that appellants can attach, affix or supply the additional information which New York requires without obtaining the prior approval therefor from the Secretary of Agriculture. No matter how that information may be disseminated, it will still be "accompanying such product" within the meaning of "label" as defined in the Poultry Products Inspection Act. Because of the nature of the product, the only place where this information is available is at the processing plant. Thus, there is no physical possibility of affixing the separate weights of the turkey, in New York or elsewhere, without having that weight statement on a part of the label and subject to the prior approval of the Secretary of Agriculture.

The Secretary has approved labels for appellants' stuffed turkeys bearing a single net weight for the complete "poultry product" in accordance with the terms of the federal act and regulations. He has withheld approval of labels submitted by appellants which would have borne separate weights. The Court below recognized the conflict but considered that it was not an irreconcilable one. The basic thrust of the District Court's holding in this regard is that the clash between federal and state action is not inevitable in this circumstance because the Secretary *could have decided otherwise!* The very simplicity of this device is dis-

arming and, if permitted to go unchallenged, could provide an easy solution for many conflict problems. However, it overlooks the fact that the discretion reposing in the Secretary to approve labels on poultry products is a legitimate and integral part of the congressional scheme for the regulation of commerce in poultry. Conceivably, Congress could have prescribed in detail the entire label of every poultry product. However, in order to establish a more practical solution, it chose to delegate to the Secretary, acting through his expert subordinates, the function of reviewing and approving labels within the framework of the standards set up in the Act. That fact does not render the Secretary's action any less a part of the federal scheme than if it had been performed by Congress itself.

In its opinion, the District Court was concerned that the action taken here in rejecting appellants' multiple weight labels was that of a "subordinate federal official." However, it is clear from Section 8(b) of the Act that the action of this "subordinate federal official" was the act of the Secretary himself. This section provides in part:

> "If the Secretary has reason to believe that any label in use or prepared for use is false or misleading in any particular, he may direct that the use of the label be withheld unless it is modified in such manner as the Secretary may prescribe so that it will not be false or misleading." (71 Stat. 444, 21 U. S. C. 457(b).)

Acting on and within the authority conferred by the statute, the Secretary has, by regulation (7 C. F. R. 81.3), delegated this responsibility to the Administrator, and the Administrator has again properly delegated this responsibility to the Poultry Division. These delegations, how-

ever, do not make the action taken on appellants' labels, any less the action of the Secretary of Agriculture.

Surely, Congress, in 1957, did not expect the Secretary of Agriculture to review and approve or disapprove all poultry labels personally. Neither did it expect that the Administrator of the Agricultural Marketing Service would perform this task personally. Nevertheless, Congress deliberately chose to use the quoted language and must, therefore, have intended that the action of the Department of Agriculture taken with respect to a proposed label would be the action of the Secretary. Thus, when it provided for an administrative hearing at the request of one who does not accept the Secretary's determination, it did not imply a review by superior over subordinate, but rather provided an opportunity for the applicant to have a full hearing of his proposal and the reasons for its rejection.

The District Court was of the opinion that appellants had an obligation to seek administrative review of the rejection of their multiple weight labels. It read the statute as though it said "anyone aggrieved" by the Secretary's determination (230 F. Supp. 398, 409). This is standard and common language. It should be noted, however, that Congress did not use this language in the statute. Rather, it resorted to the rather unusual phraseology found immediately following the language quoted above: "If the person using or proposing to use the label *does not accept* the determination of the Secretary, he may request a hearing." (Emphasis supplied.) It should not lightly be assumed that Congress intended to use the terms "aggrieved" and "does not accept" interchangeably. If Congress meant to say "aggrieved" it knew how to say it. But by its failure to do, it is appro-

priate to conclude that Congress intended the language used to have a different import.

Indeed, that this is so is clearly demonstrated in the very next sentence where the Act provides "any such determination by the Secretary shall be conclusive unless within 30 days after the receipt of notice of such final determination the person *adversely affected* thereby appeals to the United States Court of Appeals for the circuit in which he has his principal place of business or to the United States Court of Appeals for the District of Columbia Circuit." (Emphasis supplied.) Surely, it must be concluded that Congress intended these different words to have a different import.

The Administrative Procedure Act, 5 U. S. C. 1009(a), provides as follows:

> "Any person suffering a legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."

Again in the Federal Food, Drug and Cosmetic Act, the Congress twice used the term "adversely affected." 21 U. S. C. 371(f), 376(C)(i).

The inescapable conclusion from this deliberate choice of language by Congress is that the Congress intended that the acceptance by the applicant of the Secretary's determination should be final and binding for all purposes.

Appellants here did, in fact, accept the determination of the Secretary. As Mr. Hauver testified (R. 113), the determination of the Secretary was made against a background of intimate knowledge of the product, its formulation, the

processes of its manufacture, and with due regard to the inspection procedures and facilities of the Department. Plaintiffs' Exhibit 5 shows the scope of the information which the Secretary requires in connection with a proposed label (R. 112, 272-278). Both Swift and Armour have been subject to the jurisdiction of the Department of Agriculture under the Meat Inspection Act since its enactment in 1907. Against that background of experience with the expertise and the intimate knowledge of their products and processes possessed by the Department of Agriculture, both had a right to recognize the validity and soundness of the Secretary's reasons advanced in connection with the rejection of their proposed labels. They had a right to accept his determination in the light of these factors, and they did so. This may be the very reason why Congress used the language "does not accept" rather than "aggrieved."

It has long been an accepted rule of administrative law that one will not be heard to complain in the courts of administrative action or adjudication unless he has first exhausted his administrative remedies. *Myers* v. *Bethlehem Ship Building Corp.*, 303 U. S. 41; *Levers* v. *Anderson*, 326 U. S. 219. Citations to sustain this proposition could be proliferated almost endlessly. However, none has been found to sustain the proposition that he also must pursue administrative and judicial procedures if he would seek *to rely upon* an administrative determination. Other than the opinion in the Court below, no authority has been discovered which would require a party to appeal from a determination with which he agreed, even though technically it was contrary to his petition. In the instant case, the labels which were approved for appellants' stuffed turkeys are acceptable everywhere in the country except in the State of New York. When the Administrator withheld approval of ap-

pellants' application for labels showing multiple weight statements as required by New York law, appellants realized that the position taken by the Department of Agriculture was consistent, not only with its position on the hundreds of other poultry combination products, but also with its position with respect to its nearly 60 year administration of the Meat Inspection Act, 34 Stat. 1260, 21 U. S. C. 71. The law does not require that appellants expend months, maybe years of time and substantial sums of money to prove that the Administrator was right in order to perfect their standing to challenge the one state enactment which is contrary to the Federal position.

Appellants herein are not attacking the administrative determination of the Department of Agriculture. The attack was launched by the appellee and apparently furthered by the District Court. However, in so doing, the District Court seems to have overlooked an equally salutary principle. The Court should not substitute its judgment for that of the Administrator even though the Court might itself have reached a different result in the first instance. *Railroad Commission* v. *Nichols Oil Company,* 310 U. S. 573; *Panama Canal Company* v. *Grace Lines, Incorporated,* 356 U. S. 309. The Administrator, with his knowledge of all facets of the industry, and his concern with the hundreds of products which might be affected by his determination, is in a much better position to determine the appropriateness of label information than is the District Court, whose experience is largely limited to one case and one product.

The District Court was of the view that the hearing contemplated by the federal statute would be a full-blown public hearing, as to which New York must be given a notice and an opportunity to be heard. It is not at all clear that

this was the intent of Congress. However, assuming that New York would be entitled to a notice and an opportunity to be heard in such a hearing, would not the same be true of the other 49 states which permit the use of the single weight label? For aught that appears, any or all of the other 49 states may have as strong a policy in favor of single weight labeling as New York has for multiple weights. And, indeed, by the same reasoning, would not all the other producers of stuffed turkeys and the over 100 other combination poultry products be entitled to participate as well? In advance of such hearing, with the participation of any or all states and poultry processors who might be interested in the result, can any court properly say, as the District Court so blandly did here, that no one "could reasonably find that a separate statement of the weight of the stuffed bird would be false or misleading"? 230 F. Supp. 398, 409. Considering the mobility of today's population, would not the Secretary have the right to conclude that different methods of showing weight on the same product in adjoining states could be misleading? Could not the Secretary properly conclude that different methods of showing weight on different combination poultry products could be misleading to the consumer? The District Court not only undertook to substitute its judgment for the expert determination of the Secretary, but also compounded its error by prejudging in advance his determination after a hearing.

Mention was made at the trial and in the lower court's opinion of the fact that the additional weighings of appellants' turkeys in order to mark them in accordance with New York's requirements would consume no more than 30 seconds of time. Apparently, no thought was given to the fact that, if New York can impose its additional requirements, so too can the other 49 states. It was blithely as-

sumed that a label satisfactory to New York, would, *ipso facto*, be acceptable to all other states. There is no warrant in the record for this assumption. The 30 second time loss was based upon the idea that appellants would label all their stuffed turkeys with multiple weights just as they now label all their stuffed turkeys with single weights. However, as indicated, this might not be satisfactory to all the other states. There could well be additional requirements imposed by other states if this Court concludes, as did the District Court, that federal law does not preclude additional matter not subject to federal approval. See, for example, *Pacific Meat Co.* v. *Otagaski*, 394 P. 2d 618 (Hawaii, 1964).

Indeed, there is testimony in the record (R. 245-6) to indicate that the possibility of conflicting regulations was not confined to the 50 states. The City of New York has its own requirement which appears to be different from that of the State of New York and, presumably, this situation could be proliferated throughout the cities of the United States.

Our courts should not close their eyes to the realities of modern commercial life. In this era of automation and assembly line techniques, it is not economically feasible for interstate food processors to label their products separately for separate states. Any attempt to do so would immediately multiply the simple 30 second time loss many fold. It would also inevitably result in the innocent but erroneous shipment of products into the wrong states. In addition to this, one must consider the impact of conflicting regulations in neighboring states and communities upon the television advertising of appellants' products. It would be impossible for appellants to televise products showing the proper label when consumers living in jurisdictions having different label regulations view a program transmitted from a single

station. These are further reasons why the Secretary might conclude that the multiple weight label could be misleading.

And there are more. John Madden, Director of Weights and Measures of the State of New York, the official in charge of enforcement of the law here under attack, testified very candidly that the law was impractical from the standpoint of enforcement with respect to stuffed turkeys, and virtually impossible of enforcement with respect to other meat, poultry and sea-food combinations. Mr. Hauver of the Department of Agriculture testified to the Department's concern because of the impossibility of verifying the accuracy of the weight statement after thawing the turkey. The District Court thought this concern was more properly New York's. Yet it is clear from the statute and the regulations that the Secretary of Agriculture is charged with the responsibility of seeing that the consumer gets accurate label information. The District Court noted that "apparently New York had decided that a statement whose policing may require reasonable tolerance is better than none." The Court's use of the word "apparently" is well advised, because there is nothing in this record to indicate that New York permits any tolerance, official or unofficial. Again, is it inconceivable that the Secretary, faced with the harmonious testimony of his own people and the New York officials as to the impracticability and unenforcibility of multiple weight labels, would conclude that such labeling might be false or misleading?

In sum, then, the easy reconcilability of the state and federal requirements which the District Court found is based upon a series of assumptions without warrant in the record and an erroneous arrogation to itself of authority which Congress has specifically allocated to the Secretary of Agriculture. The conflict between the two authorities is

direct, real and irreconcilable. Appellants cannot comply with one without running afoul of the other. If they label their turkeys in accordance with federal requirements they are barred from sale in the State of New York. If they label their turkeys in accordance with New York requirements, federal authorities will not permit them to be shipped out of the appellants' plants. Clearer conflict cannot be imagined. Neither can there be conjured up a more direct obstruction of interstate commerce or a more complete frustration of Congressional purpose.

It is submitted that the New York statute and regulation violate the Supremacy Clause of the United States Constitution (Article VI, Section 2) because they seek to regulate the labeling of poultry moving in commerce, an area which has been pre-empted by Congress in the Poultry Products Inspection Act, and because they are in irreconcilable conflict with the labeling provisions of that Act.

The New York statute and regulation, in their application, unlawfully interfere with and obstruct interstate commerce in violation of Article I, Section 8, Clause 3 of the United States Constitution.

The wisdom of the Founding Fathers in forging a political entity sufficiently flexible to provide effective government not only for their own relatively uncomplicated agrarian society but also for the complex industrial society of the twentieth century is manifest in the simple phraseology of Article I, Section 8, Clause 3 of the Constitution they created whereby the Congress was given power

> "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

In the absence of federal legislation "(t)he Commerce Clause effects, by its own force, an apportionment of the power to regulate interstate commerce, taking from the states the power to enact laws which unduly burden commerce . . . " *Allan B. Dumont Laboratories* v. *Carroll*, 86 F. Supp. 813, 814 (E. D. Pa. 1949), aff'd 184 F. 2d 153 (3d Cir. 1950), cert. denied, 340 U. S. 929. However, where Congress has exercised its power over a subject within its constitutional reach, a state "may not, under the guise of its police power or otherwise impose burdens upon or discriminate against interstate commerce nor may it enact legislation in conflict with the statutes of Congress passed for the regulation of the subject . . . " *McDermott* v. *Wisconsin*, 228 U. S. 115, 132.

In its opinion, the District Court in this case rejected the contention of plaintiffs, who are appellants in the Supreme Court, that the New York Statute and Regulation as applied were invalid because of their interference with interstate commerce. The Court noted:

> "that the framers of the Constitution did not intend that the laws of such ancient vintage in New York and other states must yield to an *unexercised* national authority in the case of goods coming from outside the states is obvious from the mere statement". 230 F. Supp. at 402. (Emphasis supplied.)

As will be demonstrated below, the national authority referred to by the District Court has, indeed, been thoroughly exercised. However, the point made here is that appellants do not contend that either the federal Constitution or the scheme of regulation of poultry products expressed in the Poultry Products Inspection Act, 71 Stat. 441, 21 U. S. C. 451, *et seq.* and the Regulations issued thereunder, 7 C. F. R. 81.1, *et seq.*, divests the state of all its au-

thority over net weights. Appellants do assert that the federal law precludes the state from acting with respect to the *text* of a label on consumer packages of poultry products shipped in interstate commerce, although the state retains its authority to protect the public against false weights or measures.

> "It has long been recognized that in those fields where uniformity is not essential either the state or federal government may act. (Citing cases.) Where this power exists, it often happens that there is a partial exercise of that power by the federal government. In such cases, the state may legislate freely upon those phases of the commerce which are left unregulated by the nation." *Cloverleaf Butter Co.* v. *Patterson,* 315 U. S. 148, 155-6.

Appellant's contention that New York has no power to prescribe textual material for the labels of federally inspected poultry products flows from the broad scope of the Poultry Products Inspection Act, *supra,* and the regulations issued thereunder. The statute defines as a label

> "Any written, printed or graphic material upon the shipping container, if any, or upon the immediate container, *including but not limited to an individual consumer* package . . . " (21 U. S. C. 453(n).) (Emphasis supplied.)

The term "immediate package" is defined to include "any consumer package," 21 U. S. C. 453(p); the immediate container of a poultry product is required to bear the official inspection mark, the name of the product, its ingredients, the net weight, the name and address of the producer and

the official number of the processing plant, 21 U. S. C. 457(a); the channels of interstate commerce are barred to poultry products whose immediate containers are not marked in accordance with federal law, 21 U. S. C. 458(a). The repeated references in the statute to the term "consumer package" demonstrates beyond cavil the intention of Congress to exercise its power over commerce to its fullest extent. And, as the Supreme Court held in *United States* v. *Sullivan*, 332 U. S. 689, that power extends

> "to every article that had gone through interstate commerce *until it finally reached the ultimate consumer*," 332 U. S. at 697. (Emphasis supplied.)

Most pertinent, Section 8(b) of the statute, 21 U. S. C. 457(b), provides, in part, the following:

> "If the Secretary has reason to believe that any label in use or *prepared for use* is false or misleading in any particular, he may direct that the use of the label be withheld until it is modified in such manner as the Secretary may prescribe so that it will not be false or misleading." (Emphasis supplied.)

The Secretary cannot be in a position to judge whether a label "prepared for use" is false or misleading unless he has the opportunity to review that label prior to its use. To provide that opportunity, the Secretary has issued Regulations, reference to which is made below. When one views the statutory language, it is somewhat difficult to understand the District Court's reference to "an unexercised national authority," see 230 F. Supp. at 402.

As noted above, the Regulations promulgated by the Secretary of Agriculture pursuant to the authority vested

in him by Section 814 of the Poultry Products Inspection Act, 21 U. S. C. 463, contain more details with respect to labels and labeling of poultry products. By failing to make any challenge to the validity of the Regulations in the trial court, Appellee is precluded from attacking them in the Supreme Court. *Beck* v. *Washington*, 369 U. S. 541, 554; *DeSylva* v. *Ballentine*, 351 U. S. 570, 582. The Regulations repeat the statutory definition of "label" and "immediate container," 7 C. F. R. 81.1; mandate approval by the Secretary's designated agent prior to use of a printed label, 7 C. F. R. 81.127; and prescribe the wording on labels, 7 C. F. R. 81.130.

While it is true that the Legislative Finding incorporated in Section 2 of the Poultry Products Inspection Act, 21 U. S. C. 451 refers to the injury to the public caused by the movement in interstate commerce of "unwholesome and adulterated poultry products" and that the Declaration of Policy found in Section 3 of the Act, 21 U. S. C. 452, calls for

> "the inspection of poultry and poultry products . . . to prevent the movement in interstate or foreign commerce . . . of poultry and poultry products which are unwholesome, adulterated or otherwise unfit for food."

the further provisions of the statute clearly demonstrate that regulation of labeling was deemed an integral part of the inspection system mandated by Congress. Indeed, the House Committee on Agriculture, reporting on the bill which, in substance, became the Poultry Products Inspection Act, stated:

> "The purpose of this bill is to establish a system of compulsory inspection by the Federal Government of poultry and poultry products in interstate commerce

and in major intrastate consuming areas of such size and consequence as to necessarily effect (sic) interstate commerce. Such inspection would be rounded out by requirements as to the maintenance of sanitary facilities and practices and *as to correct and informative labeling of products.*" H. R. Rep. No. 465, 85th Cong., 1st Sess. 1 (1957). (Emphasis supplied.)

As a further insight into the reach of the legislation with respect to labeling, the following colloquy between Congressman John C. Watts, Chairman of the Subcommittee on Poultry and Eggs of the House Agriculture Committee and Hermon I. Miller, Director of Poultry Division of the Department of Agriculture is cited:

"Mr. Miller: . . . Section 7 is the section on labeling. And we are proposing, as I indicated, a little change here.

"This would require that the shipping container be labeled with the inspection mark affixed and the number of the official establishment.

"It would require that the immediate container, that is the consumer package, contain additional information, which we could read here, if necessary, but it is information that is required in the labeling section of the Food, Drug and Cosmetic Act, etc.

"The contents, the weight, if made up of more than one product, the constituents that are contained in it and so on and so forth . . .

"Mr. Watts: . . . As I understand it, you will make the package the housewife buys, delivered to the house, it will contain the identifying information rather than

put it on the outside of the container in which it is shipped.

"Mr. Miller: That is right." Hearing Before the Subcommittee on Poultry and Eggs of the House Committee on Agriculture, 85th Cong., 1st Sess., Ser. G at 29 (1957).

In the light of the unequivocal language of the statute in question, supported by its legislative history, to the effect that the federal authorities were given jurisdiction over labeling of poultry products, and the decision of the Secretary of Agriculture, as manifested in the Regulations he issued, to exercise his statutory authority by requiring approval of any such labeling by the Secretary or his designated agent prior to use, we come to the question of the power of the state to demand more than that prescribed by the federal government. As noted above, the Department of Agriculture was given jurisdiction over labeling of poultry products as an integral part of a comprehensive inspection system. At the trial of this action, the Deputy Director of the Poultry Division of the Agricultural Marketing Service, testifying for plaintiffs, stated:

"We approve these labels for products, and we also review at the same time when this consideration is made the processing procedure, the amounts, the variations, the ranges in the amount of stuffing and we also have inspectors stationed in plants to check on these formulated items to satisfy themselves that the product is packaged in compliance with the approved formula." (R. 127-8.)

The judgments of the Department of Agriculture relating to labeling of poultry products are made, then, in a context

of intimate knowledge of the formulation of such products and of the process by which they are manufactured together with the advantage provided by the daily presence of federal inspectors in the processing plant. The State of New York, on the other hand, with no ostensible expertise on these matters, reaches a conclusion on a labeling matter contrary to that of the Department of Agriculture and endeavors to control labeling of products manufactured in Wisconsin (R. 91) and Minnesota (R. 339). Appellants argue that New York, in imposing its will with respect to labeling of these poultry products, has trespassed upon an area already governed under the federal commerce power depriving appellants of their right to make their goods available under a federally approved label to consumers throughout the nation. A state is not permitted

> "to discredit and hinder legitimate Federal regulations of interstate commerce, to destroy rights arising out of the Federal statute which have accrued both to the government and the shippers and to impair the effect of a Federal law which has been enacted under the Constitutional power of Congress over the subject." *McDermott* v. *Wisconsin,* 228 U. S. 115, 133-4.

The District Court remarks that

> "(t)here could hardly be a fitter subject for state inspection than weights." 330 F. Supp. at 402.

But, astonishingly, the Record shows the inadequacy of the State of New York to "inspect" appellants' stuffed turkeys. The Director of Weights and Measures of the New York Department of Agriculture and Markets, testifying for defendant, admitted that the present law of New York relating to stuffed turkeys was not practical from the

standpoint of Weights and Measures (R. 232-3). Moreover, according to the same witness, it is "impossible" to check the weight of the ingredients of such combination foods as "TV dinners, ravioli, hash, pork and beans" and, despite the unquestioned application of Section 193 of the New York Agriculture and Markets Law and Regulation 221.9(c) to such products, the state's Director of Weights and Measures makes no requirement that they bear separate statements of meat and non-meat content (R. 234). These facts bear out the practical wisdom of the legislative scheme which entrusts to the Department of Agriculture plenary jurisdiction over labeling of poultry products subject to its supervision. The Supreme Court has not hesitated to

> "abrogate state law where satisfied that its enforcement would stand 'as an obstacle to the accomplishment and the execution of the full purposes and objectives of Congress.'" *Farmers Ed. and Coop. Union* v. *WDAY*, 360 U. S. 525, 535; *Bethlehem Steel Co.* v. *New York Labor Relations Board*, 330 U. S. 767, 773.

To permit each state of the union to impose its will with respect to the labeling of federally inspected and approved products would frustrate the purpose of Congress and wreak havoc on the federal program, which places responsibility for inspection of the product and concomitant approval of its labeling in the same administrative body. Such a disruption of a valid federal regulatory scheme is itself an improper burden on interstate commerce, and, when it is coupled with the chaos liable to occur from the use by processors of varying labels to satisfy the demands of different states, the added cost of preparing poultry products resulting from the need for multiple labeling and

the confusion to consumers likely to flow from the use, in various parts of the nation, of different labels, clearly constitutes interference with the free flow of commerce among the states which the Constitution of the United States aims to foster.

The New York statute and regulations, in their application, deny to appellants due process and the equal protection of law guaranteed to them by the Fourteenth Amendment of the United States Constitution.

A. *Due Process:*

Property is more than the mere thing which a person owns; it includes the right to acquire, use and dispose of it; and the Constitution, in the Fourteenth Amendment, protects these essential attributes. *Buchanan* v. *Warley,* 245 U. S. 60; *Terrace* v. *Thompson,* 263 U. S. 197; *Louis K. Liggett Co.* v. *Baldridge,* 278 U. S. 105. Valid contracts are property. *Lynch* v. *United States,* 292 U. S. 571.

A label approved by a federal agency pursuant to the provisions of a statute of Congress, exercising its power under the Commerce Clause, confers upon the holder thereof a federal right to ship a product bearing that label anywhere in the United States. In *McDermott* v. *State of Wisconsin,* 228 U. S. 115, the Supreme Court while studying a Wisconsin labeling requirement which was interpreted to forbid the sale of corn syrup bearing a federally approved label said:

> "Conceding to the state the authority to make regulations consistent with the Federal Law for the further protection of its citizens against impure and misbranded food and drugs, we think to permit such regulation as is embodied in this statute is to permit a state

to discredit and burden legitimate Federal regulations of interstate commerce, to *destroy rights arising out of the Federal Statute* which have accrued both to the government and the shipper, and to impair the effect of a Federal law * * * " (228 U. S. at 133-4). (Emphasis added.)

See also *Quaker Oats Company* v. *City of New York,* 295 N. Y. 527, affirmed sub nom. *Hill Packing Company* v. *City of New York,* 331 U. S. 787; *Cloverleaf Butter Co.* v. *Patterson,* 315 U. S. 148.

Federal law and Federal policy not only approve a single weight statement on a stuffed turkey label, but reject approval for a multiple weight statement on such a label. Therefore, the necessary result of the New York statute is that the only stuffed turkeys which may be sold in the State of New York are those produced therein. No stuffed turkey labeled in accordance with the New York requirements may be shipped in interstate commerce. Thus, whatever may have been its purpose, the inevitable effect of the New York law is to discriminate against interstate commerce.

The phrase due process of law "formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of the facts involved in the given case." *Betts* v. *Brady,* 316 U. S. 455, 462. It is a concept of fundamental justice, and it is not satisfied by mere formal correctness. *Foster* v. *Illinois,* 332 U. S. 134. It requires that action by a state through any of its agencies must be consistent with the fundamental principles of liberty and justice. *Buchalter* v. *New York,* 319 U. S. 427; *Hebert* v. *Louisiana,* 272 U. S. 312. It is secured if the laws operate on

all alike, and does not subject the individual to an arbitrary exercise of the powers of government. *Missouri P. R. Co.* v. *Mackey,* 127 U. S. 205; *Minneapolis & St. L. R. Co.* v. *Herrick,* 127 U. S. 210; *Leeper* v. *Texas,* 139 U. S. 462; *Giozza* v. *Tiernan,* 148 U. S. 657; *Duncan* v. *Missouri,* 152 U. S. 377.

The Legislature of the State of New York in Section 193 of the Agriculture and Markets Law has sought to regulate the labeling of meat, poultry and seafood combinations. The Commissioner of Agriculture and Markets of that state by Regulation 221.9(c) has purported to do likewise. However, according to the testimony of Mr. Madden, who stands in the shoes of the Commissioner, the latter in fact carries out the Legislature's mandate and his own only against stuffed turkeys. Thus, the Commissioner seeks to function behind a facade of formal correctness. However, it is clear merely by a statement of the facts that the action of New York State through its Department of Agriculture and Markets is not consistent with the fundamental principles of liberty and justice. Furthermore, due process was not herein secured because the law of New York does not operate on all alike, even though by its terms it purports to do so. Rather, it subjects the individual, the processor of stuffed turkeys, to an arbitrary exercise of the powers of government.

B. *Equal Protection:*

The prohibition of this amendment extends to all action of the state denying equal protection of the laws, whether it be action by the legislative, executive or judicial branch of the state government; it includes the actions of any agency of a state and the officers or agents by whom its powers are asserted. *Tribune Review Pub. Co.* v. *Thomas,* 120 F. Supp. 362 (W. D. Pa. 1954).

Where a state is dealing with its domestic concerns and not trenching upon prerogatives of national government, a state's legislative power to classify is extremely broad and limited only by constitutional rights and by the doctrine that a scheme may not be palpably arbitrary. *Phillips Chemical Co.* v. *Dumas Independent School Dist.*, 361 U. S. 376, rehearing denied, 362 U. S. 937.

While legislative classification need only withstand the test of constitutionality, classification by the executive under delegated authority should be consistent with the intent of the legislature. *North American Van Lines, Inc.* v. *United States,* 169 F. Supp. 252, certiorari denied, 359 U. S. 1011. Such classification made in the exercise of police power must be based on some real and substantial difference which bears a reasonable and just relation to the object of the legislation, and the constitutional guaranty of equal protection of the laws will be interposed against discriminations that are entirely arbitrary. *Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389; *Power Mfg. Co.* v. *Saunders,* 274 U. S. 490; *Smith* v. *Cahoon,* 283 U. S. 553.

Mr. Madden, Director of Weights and Measures of the State of New York, confesses that separate statements as to the weight of various components are not required in the labeling of other combination products (R. 234). It is particularly interesting to note that his reason for not applying the requirement to other products, such as TV dinners, is that it is impossible. With regard to the law's application to stuffed turkeys, Mr. Madden feels that it is merely impractical (R. 233). Appellants submit that it is not any more impossible in the one instance than the other and, whether or not it be possible, it is certainly impractical in both instances. The enforcement of the law with regard to one item and not other items included within the same legis-

lative classification is purely whimsical, capricious, arbitrary and unsupported as to reasonableness by either Mr. Madden or any other witness; and, it is therefore clearly a violation of the appellants' constitutional guaranty of equal protection of law.

The question of equal protection is to be answered by practical considerations based on experience, such as whether a classification has relation to the purpose for which it is made, rather than by theoretical inconsistency. *Railway Express Agency* v. *New York,* 336 U. S. 106. The prohibitions of the Fourteenth Amendment extend to all actions of a State denying protection of the laws, whatever the agency of the State taking the action or whatever the guise in which it is taken. *Cooper* v. *Aaron,* 358 U. S. 1, 20.

A state does not ordinarily violate the equal protection of the laws requirement when the statutory provision complained of is applied equally to enterprises located both within and without the state. However, in this situation, the state statute denies the equal protection of law because it operates to exclude all such products of extra-state enterprises because they bear the Federally approved label, or, conversely because it is impossible for them to comply with the State Statute without violating the Federal Statute.

A foreign manufacturer must ship its product in interstate commerce and, therefore, must comply with the Federal Poultry Products Inspection Act which requires total net weight label. Such a label precludes the product from the New York market. New York's exclusion of products bearing the federally approved label denies to appellants the equal protection of law guaranteed to them by the Fourteenth Amendment.

Because of substantial issues of unconstitutionality under the Supremacy Clause, the Commerce Clause and the Fourteenth Amendment, this case was properly heard by a Three-Judge District Court, pursuant to 28 U. S. C. 2281.

Section 2281 of Title 28 U. S. C. provides that an injunction restraining enforcement of a state statute may not be granted on the ground of constitutionality of such statute "unless the application therefor is heard and determined by a district court of three judges . . . " Section 1253 of Title 28 U. S. C. provides that any order granting or denying an injunction in any civil action required by any Act of Congress to be heard and determined by a district court of three judges may be appealed directly to the Supreme Court.

The Court below expressed serious doubt as to the applicability of Section 2281 to this cause. In its opinion, however, the Court referred only to the case of *Kesler* v. *Department of Public Safety of Utah,* 369 U. S. 153. As will appear below, it is doubtful the decision in *Kesler* and the distinction therein articulated are applicable to this case. However, assuming, *arguendo,* that they may be, it still would appear that this was a proper case for the application of Section 2281 and therefore a proper subject for direct appeal to this Court.

In *Kesler,* the Court held that where the conflict between state and federal statutes was immediately apparent, so that the constitutional issue under the Supremacy Clause of the Constitution could be reached without intermediate steps of statutory construction, Section 2281 could be properly invoked. However, as noted by the Court below, the Supreme Court did not reach a constitutional issue in *Kesler* without considerable construction of both the Bank-

ruptcy Act and the Utah Motor Vehicle Safety Responsibility Act. Thus, the issue would appear to be whether this case requires more statutory construction than was required in *Kesler*. Unlike *Kesler*, no serious problem is here involved in discovering the meaning and application of the New York Statute and Regulation. New York's requirement is clear and undisputed, whereas there was substantial controversy as to whether the purpose of the Utah law was to foster motor vehicle safety or the collection of judgments. The Courts in both cases sought the policy underlying the federal enactments in order to determine whether the apparent conflict was irreconcilable. Thus, this case appears to involve less, but in any event, not more statutory construction than *Kesler*. Therefore, even under the rule laid down by the Supreme Court in *Kesler*, it appears that this case is properly in this Court.

It should be noted, however, that the sole challenge to the constitutionality of the Utah statute in *Kesler* was based upon conflict with the Federal Bankruptcy Act. In that respect, the case at bar is substantially different because appellants here also rely upon violation of the Commerce Clause and the Fourteenth Amendment. The Court below apparently confined its attention to *Kesler* because of its feeling that, on the proof adduced at the trial, these other allegations of unconstitutionality were insubstantial. Therefore, it concluded that this case rested on the same basis as *Kesler*.

However, the arguments made by appellants elsewhere in this brief should convince the Court that the challenges to the constitutionality of the New York statute and regulations are not without substance.

Furthermore, it would appear that this case should more properly be considered in the light of the rule enunciated by this Court in *Florida Lime and Avocado Growers* v. *Jacobsen*, 362 U. S. 73. There, this Court adopted the position that a Three-Judge Court is properly convened under Section 2281 in any case in which an injunction may be granted on ground of federal unconstitutionality. In that case, as in this, plaintiff sought an injunction on grounds of (1) conflict with a federal statute, (2) violation of the Commerce Clause of the United States Constitution, and (3) violation of the rights guaranteed by the Fourteenth Amendment.

After reviewing the history of Section 2281 and its antecedents, the Court said at page 80:

> "Section 2281, read in the light of this background, seems clearly to require that when, in any action to enjoin enforcement of a state statute, the injunctive decree may issue on the ground of federal unconstitutionality of the state statute, the convening of a three-judge court is necessary; and the joining in the complaint of a non-constitutional attack along with the constitutional one does not dispense with the necessity to convene such a court. To hold to the contrary would be to permit one federal district judge to enjoin enforcement of a state statute on the ground of federal unconstitutionality whenever a non-constitutional ground of attack was also alleged, and this might well defeat the purpose of Section 2281."

From a thorough reading of the *Jacobsen* case, it is plain that the determination of the propriety of convening a Three-Judge Court under Section 2281 is to be determined upon a reading of the complaint. The issue of the jurisdic-

tion of a Three-Judge Court depends upon the allegation of substantial grounds of federal unconstitutionality. Section 2281 does not intend that the question of the court's jurisdiction shall be postponed until after a trial has been concluded.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed and the cause remanded to the District Court with instructions to enter judgment for appellants declaring the New York Statute and Regulation unconstitutional and granting an injunction as prayed for in the complaint.

Respectfully submitted,

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APPENDIX A

Statutes

PUBLIC LAW 85-172

85TH CONGRESS, S. 1747

August 28, 1957

AN ACT

—71 Stat. 441—

To provide for the compulsory inspection by the United States Department of Agriculture of poultry and poultry products.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act [Poultry Products Inspection Act] may be cited as the "Poultry Products Inspection Act".

LEGISLATIVE FINDING

SEC. 2. Wholesome poultry products are an important source of the Nation's total supply of food. Such products are consumed throughout the Nation and substantial quantities thereof move in interstate and foreign commerce. Unwholesome and adulterated poultry products in the channels of interstate or foreign commerce, are injurious to the public welfare, adversely affect the marketing of wholesome poultry products, result in sundry losses to producers, and destroy markets for wholesome poultry products. The marketing of wholesome poultry products is affected with the public interest and directly affects the welfare of the people. All poultry and poultry products which have or are required to have inspection under this Act are either in the current of interstate or foreign commerce or directly affect such commerce. That part that enters directly into the current of interstate or foreign commerce cannot be effectively inspected and regulated without also inspecting and regu-

lating all poultry and poultry products processed or handled in the same establishment.

The great volume of poultry products required as an article of food for the inhabitants of large centers of population may directly affect the movement of poultry and poultry products in interstate commerce. To protect interstate commerce in poultry and poultry products inspected for wholesomeness, from being adversely burdened, obstructed, or affected by uninspected poultry or poultry products, major consuming areas where poultry or poultry products are handled or consumed in such volume as to affect the movement of inspected poultry or poultry products in interstate commerce should be designated by the Secretary pursuant to the provisions of this Act.

Declaration of Policy

Sec. 3. It is hereby declared to be the policy of Congress to provide for the inspection of poultry and poultry products by the inspection service as herein provided to prevent the movement in interstate or foreign commerce or in a designated major consuming area of poultry products which are unwholesome, adulterated, or otherwise unfit for human food.

Definitions

Sec. 4. For purposes of this Act—

(a) The term "commerce" means commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State or the District of Columbia, but through any place outside thereof; or within the District of Columbia.

(b) The term "Secretary" means the Secretary of Agriculture.

(c) The term "person" means any individual, partnership, corporation, association, or any other business unit.

(d) The term "poultry" means any live or slaughtered domesticated bird.

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(e) The term "poultry product" means any poultry which has been slaughtered for human food from which the blood, feathers, feet, head, and viscera have been removed in accordance with rules and regulations promulgated by the Secretary, any edible part of poultry, or, unless exempted by the Secretary, any human food product consisting of any edible part of poultry separately or in combination with other ingredients.

(f) The term "wholesome" means sound, healthful, clean, and otherwise fit for human food.

(g) The term "unwholesome" means:

(1) Unsound, injurious to health, or otherwise rendered unfit for human food.

(2) Consisting in whole or in part of any filthy, putrid, or decomposed substance.

(3) Processed, prepared, packed, or held under unsanitary conditions whereby a poultry carcass or parts thereof or any poultry product may have become contaminated with filth or whereby a poultry product may have been rendered injurious to health.

(4) Produced in whole or in part from poultry which has died otherwise than by slaughter.

(5) Packaged in a container composed of any poisonous or deleterious substance which may render the contents injurious to health.

(h) The term "adulterated" shall apply to poultry and poultry products under one or more of the following circumstances:

(1) If they bear or contain any poisonous or deleterious substance which may render them injurious to health; but, in case the substance is not an added substance, such poultry and poultry products shall not be considered adulterated under this clause if the quantity of such substance in such poultry and poultry products does not ordinarily render them injurious to health.

(2) If they bear or contain any added poisonous or added deleterious substance, unless such substance is permitted in their production or unavoidable under good manufacturing practices as may be determined by rules and regulations hereunder prescribed by the Secretary or other provisions of Federal law limiting or tolerating the quantity of such added substance on or in such poultry and poultry products: *Provided,* That any quantity of such added substance exceeding the limits so fixed shall also be deemed to constitute adulteration.

(3) If any substance has been substituted, wholly or in part, therefor.

(4) If damage or inferiority has been concealed in any manner.

(5) If any valuable constituent has been in whole or in part omitted or abstracted therefrom.

(6) If any substance has been added thereto or mixed or packed therewith so as to increase its bulk or weight, or reduce its quality or strength, or make it appear better or of greater value than it is.

(i) The term "inspector" means: (1) an employee or official of the United States Government authorized by the Sec-

retary to inspect poultry and poultry products under the authority of this Act, or (2) any employee or official of any State government authorized by the Secretary to inspect poultry and poultry products under authority of this Act, under an agreement entered into between the Secretary and the appropriate State agency.

(j) The term "official inspection mark" means the symbol, formulated pursuant to rules and regulations prescribed by the Secretary, stating that the product was inspected.

(k) The term "inspection service" means the official Government service within the Department of Agriculture
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designated by the Secretary as having the responsibility for carrying out the provisions of this Act.

(l) The terms "container" or "package" include any box, can, tin, cloth, plastic, or any other receptacle, wrapper, or cover.

(m) The term "official establishment" means any establishment as determined by the Secretary at which inspection of the slaughter of poultry, or the processing of poultry products, is maintained under the authority of this Act.

(n) The term "label" means any written, printed, or graphic material upon the shipping container, if any, or upon the immediate container, including but not limited to an individual consumer package, of the poultry product, or accompanying such product.

(o) The term "shipping container" means any container used or intended for use in packaging the product packed in an immediate container.

(p) The term "immediate container" includes any consumer package; or any other container in which poultry

carcasses or poultry products, not consumer packaged, are packed.

DESIGNATION

SEC. 5. Upon application by any appropriate State or local official or agency of a substantial portion of any major consuming area or upon application by an appropriate local poultry industry group in such an area, where the Secretary has reason to believe that poultry or poultry products are handled or consumed in such volume as to affect, burden, or obstruct the movement of inspected poultry products in interstate commerce, the Secretary shall conduct a public hearing to ascertain whether or not it will tend to effectuate the purposes of this Act for such area to be subject to the provisions of this Act. If after public hearing the Secretary finds that poultry or poultry products are handled or consumed in such volume as to affect, burden, or obstruct the movement of inspected poultry products in commerce and that the designation of such area will tend to effectuate the purposes of this Act, he shall by order designate such area and prescribe the provisions of this Act which shall be applicable thereto and grant such exemptions therefrom as he determines practicable. Such designation [Publication in F. R.] shall not become effective until six months after the notice thereof is published in the Federal Register. On and after the effective date of such designation, all poultry and poultry products processed, sold, received, or delivered in any such area shall be subject to the provisions of this Act.

ANTE MORTEM AND POST MORTEM INSPECTION, REINSPECTION, AND QUARANTINE

SEC. 6. (a) For the purpose of preventing the entry into or flow or movement in commerce or a designated major consuming area of any poultry product which is unwholesome or adulterated, the Secretary shall, where and to the extent

considered by him necessary, cause to be made by inspectors ante mortem inspection of poultry in any official establishment processing poultry or poultry products for commerce or in, or for marketing in a designated city or area.

(b) The Secretary, whenever processing operations are being conducted, shall cause to be made by inspectors post mortem inspection of the carcass of each bird processed, and at any time such quarantine, segregation, reinspection as he deems necessary of poultry and poultry products in each official establishment processing such poultry or poultry products for commerce or in, or for marketing in a designated city or area.

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(c) All poultry carcasses and parts thereof and poultry products found to be unwholesome or adulterated shall be condemned and shall, if no appeal be taken from such determination of condemnation, be destroyed for human food purposes under the supervision of an inspector: *Provided*, That carcasses, parts, and products, which may by reprocessing be made not unwholesome and not adulterated, need not be so condemned and destroyed if so reprocessed under the supervision of an inspector and thereafter found to be not unwholesome and not adulterated. If an appeal be taken from such determination, the carcasses, parts, or products shall be appropriately marked and segregated pending completion of an appeal inspection, which appeal shall be at the cost of the appellant if the Secretary determines that the appeal is frivolous. If the determination of condemnation is sustained the carcasses, parts, and products shall be destroyed for human food purposes under the supervision of an inspector.

SANITATION, FACILITIES, AND PRACTICES

SEC. 7. (a) Each official establishment slaughtering poultry or processing poultry products for commerce or in

or for marketing in a designated major consuming area shall have such premises, facilities, and equipment, and be operated in accordance with such sanitary practices, as are required by regulations promulgated by the Secretary for the purpose of preventing the entry into or flow or movement in commerce or in a designated major consuming area, of poultry products which are unwholesome or adulterated.

(b) The Secretary shall refuse to render inspection to any establishment whose premises, facilities, or equipment, or the operation thereof, fail to meet the requirements of this section.

LABELING

SEC. 8. (a) Each shipping container of any poultry product inspected under the authority of this Act and found to be wholesome and not adulterated, shall at the time such product leaves the official establishment bear, in distinctly legible form, the official inspection mark and the approved plant number of the official establishment in which the contents were processed. Each immediate container of any poultry product inspected under the authority of this Act and found to be wholesome and not adulterated shall at the time such product leaves the official establishment bear, in addition to the official inspection mark, in distinctly legible form, the name of the product, a statement of ingredients if fabricated from two or more ingredients including a declaration as to artificial flavors, colors, or preservatives, if any, the net weight or other appropriate measure of the contents, the name and address of the processor and the approved plant number of the official establishment in which the contents were processed. The name and address of the distributor may be used in lieu of the name and address of the processor if the approved plant number is used to identify the official establishment in which the poultry product

was prepared and packed. The Secretary may permit reasonable variations and grant exemptions from the foregoing labeling requirements in any manner not in conflict with the purposes of this Act.

(b) The use of any written, printed or graphic matter upon or accompanying any poultry product inspected or required to be inspected pursuant to the provisions of this Act or the container thereof which is false or misleading in any particular is prohibited. No poultry products inspected or required to be inspected pursuant to the provisions of this Act shall be sold or offered for sale by any person, firm, or corporation under any false or deceptive name; but estab-

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lished trade name or names which are usual to such products and which are not false and deceptive and which shall be approved by the Secretary are permitted. If the Secretary has reason to believe that any label in use or prepared for use is false or misleading in any particular, he may direct that the use of the label be withheld unless it is modified in such manner as the Secretary may prescribe so that it will not be false or misleading. If the person using or proposing to use the label does not accept the determination of the Secretary, he may request a hearing, but the use of the label shall, if the Secretary so directs, be withheld pending hearing and final determination by the Secretary. Any such determination by the Secretary shall be conclusive unless within thirty days after the receipt of notice of such final determination the person adversely affected thereby appeals to the United States court of appeals for the circuit in which he has his principal place of business or to the United States Court of Appeals for the District of Columbia Circuit. The provisions of section 204 of the Packers and Stockyards Act of 1921 [42 Stat. 162], as amended [7 U. S. C. 194], shall be applicable to appeals taken under this section.

PROHIBITED ACTS

SEC. 9. The following acts or the causing thereof are hereby prohibited:

(a) The processing, sale or offering for sale, transportation, or delivery or receiving for transportation, in commerce or in a designated major consuming area of any poultry product, unless such poultry product has been inspected for wholesomeness and unless the shipping container, if any, and the immediate container are marked in accordance with the provisions of this Act.

(b) The sale or other disposition for human food of any poultry or poultry product which has been inspected and declared to be unwholesome or adulterated under this Act.

(c) Falsely making or issuing, altering, forging, simulating, or counterfeiting any official inspection certificate, memorandum, mark, or other identification, or device for making such mark or identification, used in connection with the inspection of poultry or poultry products under this Act, or causing, procuring, aiding, assisting in, or being a party to, such false making, issuing, altering, forging, simulating, or counterfeiting, or knowingly possessing, without promptly notifying the Secretary of Agriculture or his representative, uttering, publishing, or using as true, or causing to be uttered, published, or used as true, any such falsely made or issued, altered, forged, simulated, or counterfeited official inspection certificate, memorandum, mark, or other identification, or device for making such mark or identification, or representing that any poultry or poultry product has been officially inspected under the authority of this Act when such poultry or poultry product has in fact not been so inspected.

(d) Using in commerce, or in a designated major consuming area, a false or misleading label on any poultry product.

(e) The use of any container bearing an official inspection mark except for the poultry product in the original form in which it was inspected and covered by said mark unless the mark is removed, obliterated, or otherwise destroyed.

(f) The refusal to permit access by any duly authorized representative of the Secretary, at all reasonable times, to the premises of an establishment engaged in processing poultry or poultry products for commerce, or in or for marketing in a designated major consuming area, upon presentation of appropriate credentials.

(g) The refusal to permit access to and the copying of any record as authorized by section 11 of this Act.

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(h) The using by any person to his own advantage, or revealing, other than to the authorized representatives of the Government in their official capacity, or to the courts when relevant in any judicial proceeding under this Act, any information acquired under the authority of this Act, concerning any matter which as a trade secret is entitled to protection.

(i) Delivering, receiving, transporting, selling, or offering for sale or transport for human consumption any slaughtered poultry or any part thereof, separately or in combination with other ingredients (other than poultry products as defined in this Act), in commerce or from an official establishment or in a designated major consuming area, except as may be authorized by and pursuant to rules and regulations prescribed by the Secretary.

COMPLETE COVERAGE OF OFFICIAL ESTABLISHMENTS

SEC. 10. No establishment processing poultry or poultry products for commerce or in or for marketing in a desig-

nated major consuming area shall process any poultry or poultry product except in compliance with the requirements of this Act.

RECORDS OF INTERSTATE SHIPMENT

SEC. 11. For the purpose of enforcing the provisions of this Act, persons engaged in the business of processing, transporting, shipping, or receiving poultry slaughtered for human consumption or poultry products in commerce or in a designated major consuming area, or holding such products so received shall maintain records showing, to the extent that they are concerned therewith, the receipt, delivery, sale, movement, or disposition of poultry and poultry products and shall, upon the request of a duly authorized representative of the Secretary, permit him at reasonable times to have access to and to copy all such records. Any record required to be maintained by this section shall be maintained for a period of two years after the transaction, which is the subject of such record, has taken place.

PENALTIES

SEC. 12. (a) Any person who violates the provisions of section 9, 10, 11, or 17, shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than six months, or a fine of not more than $3,000, or both such imprisonment and fine; but if such violation is committed after one conviction of such person under this section has become final such person shall be subject to imprisonment for not more than one year, or a fine of not more than $5,000, or both such imprisonment and fine; but if such violation is committed after two or more convictions of such person under this section have become final such person shall be subject to imprisonment for not more than

two years, or a fine of not more than $10,000, or both such imprisonment and fine. When construing or enforcing the provisions of said sections the act, omission, or failure of any person acting for or employed by any individual, partnership, corporation, or association within the scope of his employment or office shall in every case be deemed the act, omission, or failure of such individual, partnership, corporation, or association, as well as of such person.

(b) No carrier shall be subject to the penalties of this Act, other than the penalties for violation of section 11, by reason of his receipt, carriage, holding, or delivery, in the usual course of business, as a carrier, of slaughtered poultry or poultry products, owned by another person unless the carrier has knowledge, or is in possession of facts which

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would cause a reasonable person to believe that such slaughtered poultry or poultry products were not inspected or marked in accordance with the provisions of this Act or were not otherwise eligible for transportation under this Act.

REPORTING OF VIOLATIONS

SEC. 13. Before any violation of this Act is reported by the Secretary to any United States attorney for institution of a criminal proceeding, the person against whom such proceeding is contemplated shall be given reasonable notice of the alleged violation and opportunity to present his views orally or in writing with regard to such contemplated proceeding. Nothing in this Act shall be construed as requiring the Secretary to report for criminal prosecution violations of this Act whenever he believes that the public interest will be adequately served and compliance with the Act obtained by a suitable written notice or warning.

REGULATIONS

SEC. 14. The Secretary shall promulgate such rules and regulations as are necessary to carry out the provisions of this Act.

EXEMPTIONS

SEC. 15. (a) The Secretary shall, by regulation and under such conditions as to sanitary standards, practices, and procedures as he may prescribe, exempt from specific provisions of this Act—

(1) poultry producers with respect to poultry of their own raising on their own farms which they sell directly to household consumers or restaurants, hotels, and boarding houses for use in their own dining rooms or in the preparation of meals for sales direct to consumers only: *Provided,* That such poultry producers do not engage in buying or selling poultry products other than those produced from poultry raised on their own farms;

(2) retail dealers with respect to poultry products sold directly to consumers in individual retail stores, if the only processing operation performed by such retail dealers is the cutting up of poultry products on the premises where such sales to consumers are made;

(3) for such period of time as the Secretary determines that it would be impracticable to provide inspection and exemption will aid in the effective administration of this Act, any person engaged in the processing of poultry or poultry products for commerce and the poultry or poultry products processed by such person: *Provided, however,* That no such exemption shall continue in effect on and after July 1, 1960; and

(4) persons slaughtering, processing, or otherwise handling poultry or poultry products which have been or are to be processed as required by recognized religious dietary laws, to the extent that the Secretary determines necessary to avoid conflict with such requirements while still effectuating the purposes of this Act.

(b) The Secretary may by order suspend or terminate any exemption under this section with respect to any person whenever he finds that such action will aid in effectuating the purposes of this Act.

—71 Stat. 448—

VIOLATIONS BY EXEMPTED PERSONS

SEC. 16. Any person who sells, delivers, transports or offers for sale or transportation in commerce or in a designated major consuming area any poultry or poultry products which are exempt under section 15, and which are unwholesome or adulterated and are intended for human consumption, shall be guilty of a misdemeanor and shall on conviction thereof be subject to the penalties set forth in section 12.

IMPORTS

SEC. 17. (a) No slaughtered poultry, or parts or products thereof, of any kind shall be imported into the United States unless they are healthful, wholesome, fit for human food, not adulterated, and contain no dye, chemical, preservative, or ingredient which renders them unhealthful, unwholesome, adulterated, or unfit for human food and unless they also comply with the rules and regulations made by the Secretary of Agriculture to assure that imported poultry or poultry products comply with the standards provided for in this Act. All imported, slaughtered poultry,

or parts or products thereof, shall after entry into the United States in compliance with such rules and regulations be deemed and treated as domestic slaughtered poultry, or parts or products thereof, within the meaning and subject to the provisions of this Act and the Federal Food, Drug, and Cosmetic Act [52 Stat. 1040], and Acts amendatory of [21 U. S. C. 301], supplemental to, or in substitution for such Acts.

(b) The Secretary of Agriculture is authorized to make rules and regulations to carry out the purposes of this section and in such rules and regulations the Secretary of Agriculture may prescribe the terms and conditions for the destruction of all slaughtered poultry, or parts or products thereof, offered for entry and refused admission into the United States unless such slaughtered poultry, or parts or products thereof, be exported by the consignee within the time fixed therefor in such rules and regulations.

(c) All charges for storage, cartage, and labor with respect to any product which is refused admission pursuant to this section shall be paid by the owner or consignee, and in default of such payment shall constitute a lien against any other products imported thereafter by or for such owner or consignee.

GENERAL PROVISIONS

SEC. 18. (a) For the purpose of preventing and eliminating burdens on commerce in poultry and poultry products, the jurisdiction of the Secretary within the scope of this Act shall be exclusive and poultry and poultry products shall be exempt from the provisions of the Federal Food, Drug, and Cosmetic Act, as amended [21 U. S. C. 301], to the extent of the application or the extension thereto of the provisions of this Act.

(b) In carrying out the provisions of this Act, the Secretary may cooperate with other branches of Government and with State agencies and may conduct such examinations, investigations, and inspections as he determines practicable through any officer or employee of a State commissioned by the Secretary for such purpose.

COST OF INSPECTION

SEC. 19. The cost of inspection rendered under the requirements of this Act, shall be borne by the United States, except that the cost of overtime and holiday work performed in establishments subject to the provisions of this Act at such rates as the Secretary may determine shall be borne by such establishments. Sums received by the Secretary in

—71 Stat. 449—

reimbursement for sums paid out by him for such premium pay work shall be available without fiscal year limitation to carry out the purposes of this section.

APPROPRIATIONS

SEC. 20. There is hereby authorized to be appropriated such sums as are necessary to carry out the provisions of this Act.

SEPARABILITY OF PROVISIONS

SEC. 21. If any provision of this Act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the Act and of the application of such provision to other persons and circumstances shall not be affected thereby.

EFFECTIVE DATE

SEC. 22. This Act shall take effect upon enactment, except that no person shall be subject to the provisions of

this Act prior to January 1, 1959, unless such person after January 1, 1958, applies for and receives inspection for poultry or poultry products in accordance with the provisions of this Act and pursuant to regulations promulgated by the Secretary hereunder, in any establishment processing poultry or poultry products in commerce or in a designated major consuming area. Any person who voluntarily applies for and receives such inspection after January 1, 1958, shall be subject, on and after the date he commences to receive such inspection, to all of the provisions and penalties provided for in this Act with respect to all poultry or poultry products handled in the establishment for which such said application for inspection is made.

Approved August 28, 1957.

Regulations Governing the Inspection of Poultry and Poultry Products (7 C. F. R. Part 81)

Definitions

§81.1 *Definitions.* For the purposes of the regulations in this part, unless the context otherwise requires, the following terms shall have the following meanings:

Acceptable. "Acceptable" means suitable for the purpose intended and acceptable to the Administrator.

Act. "Act" means the Poultry Products Inspection Act (71 Stat. 441).

Administrator. "Administrator" means the Administrator of the Agricultural Marketing Service of the Department or any other officer or employee of the Department to whom there has heretofore been delegated, or to whom there may hereafter be delegated the authority to act in his stead.

Adulterated. "Adulterated" shall apply to poultry and poultry products under one or more of the following circumstances:

(1) If they bear or contain any poisonous or deleterious substance which may render them injurious to health, but, in case the substance is not an added substance, such poultry and poultry products shall not be considered adulterated under this clause if the quantity of such substance in such poultry and poultry products does not ordinarily render them injurious to health.

(2) If they bear or contain any added poisonous or added deleterious substance, unless such substance is permitted in their production or unavoidable under good manufacturing practices as may be determined by the regulations in this part or other provisions of Federal law limiting or tolerating the quantity of such added substance on or in such poultry and poultry products: *Provided*, That any quantity of such added substance exceeding the limits so fixed shall also be deemed to constitute adulteration.

(3) If any substance has been substituted, wholly or in part, therefor.

(4) If damage or inferiority has been concealed in any manner.

(5) If any valuable constituent has been in whole or in part omitted or abstracted therefrom.

(6) If any substance has been added thereto or mixed or packed therewith so as to increase its bulk or weight, or reduce its quality or strength, or make it appear better or of greater value than it is.

Applicant. "Applicant" means any person who requests any inspection service.

Commerce. "Commerce" means commerce between any State, Territory, or possession or the District of Columbia, and any place outside thereof; or between points within the same State, or the District of Columbia, but through any place outside thereof; or within the District of Columbia, or between a designated major consuming area and any point outside thereof; or within a designated major consuming area.

Consumer package. "Consumer package" means any container in which a poultry product is enclosed for the purpose of display and sale to household consumers.

Container or package. "Container or package" includes any box, can, tin, cloth, plastic, or any other receptacle, wrapper, or cover.

Department. "Department" means the United States Department of Agriculture.

Dressed poultry. "Dressed poultry" means poultry which has been slaughtered for human food with head, feet, and viscera intact and from which the blood and feathers have been removed.

Dressed poultry identification mark. "Dressed poultry identification mark" means the symbol formulated pursuant to the regulations in this part stating that the dressed poultry is eligible for further processing in official establishments under USDA inspection.

Food product containing poultry product. "Food product containing poultry product" means any article of food for human consumption which is prepared in part from ready-to-cook poultry, but which has been exempted by the Administrator from the category of a poultry food product.

Free from protruding pinfeathers. "Free from protruding pinfeathers" means that the carcass is free from protruding pinfeathers which are visible to an inspector during an examination of the carcass at normal operating speeds. However, a carcass may be considered as being free from protruding pinfeathers if it has a generally clean appearance (especially on the breast), and if not more than an occasional protruding pinfeather is in evidence during a more careful examination of the carcass.

Giblets. "Giblets" means the liver from which the bile sac has been removed, the heart from which the pericardial sac has been removed, and the gizzard from which the lining and contents have been removed: *Provided,* That each such organ has been properly trimmed and washed.

Immediate container. The term "immediate container" includes any consumer package; or any other container in which poultry carcasses or poultry products, not consumer packaged, are packed.

Inspected for wholesomeness. "Inspected for wholesomeness" means, with respect to any poultry product, that it has undergone an inspection and was found at the time of such inspection to be wholesome and not adulterated.

Inspection. "Inspection" means any ante mortem examination of poultry or any post-mortem inspection of dressed poultry at the time of evisceration or any inspection by an inspector to determine in accordance with the regulations in this part (1) the wholesomeness of any poultry product at any stage of the preparation or packaging thereof in the official establishment where inspected for wholesomeness, or (2) the wholesomeness of any previously inspected poultry product if such poultry product has not lost its identity as an inspected product.

Inspection service. "Inspection service" means the official service within the Department having the responsibility for carrying out the provisions of the Poultry Products Inspection Act. Inspection service also means the activities performed, including official reporting, by such official service.

Inspector. "Inspector" means (1) an employee or official of the United States Government, authorized by the

Administrator to inspect poultry and poultry products, pursuant to the regulations in this part, or (2) an employee or official of any State government, authorized by the Administrator to inspect poultry and poultry products, pursuant to the regulations in this part, under an agreement entered into between the Agricultural Marketing Service and the appropriate State agency.

Label. "Label" means any written, printed, or graphic material upon the shipping container, if any, or upon the immediate container, including but not limited to an individual consumer package of the poultry product, or accompanying such product.

Official establishment. "Official establishment" means any establishment as determined by the Administrator at which inspection of the slaughter of poultry, or the processing of poultry products, is maintained pursuant to the regulations in this part.

Official identification. "Official identification" means the official inspection mark or the dressed poultry identification mark.

Official inspection mark. "Official inspection mark" means the symbol, formulated pursuant to the regulations in this part, stating that the poultry product was inspected.

Person. "Person" means any individual, partnership, corporation, association, or any other business unit.

Potable water. "Potable water" means water that has been approved by the State health authority or agency or laboratory acceptable to the Administrator as safe for drinking, and suitable for food processing.

Poultry. "Poultry" means any live or slaughtered domesticated bird (chickens, turkeys, ducks, geese or guineas).

Poultry food product. "Poultry food product" means any human food product consisting of any edible part or parts of poultry in combination with other ingredients unless such human food product is exempted by the Administrator.

Poultry product. "Poultry product" means any ready-to-cook poultry or any poultry food product.

Product. "Product" means dressed poultry or poultry product or both.

Ready-to-cook poultry. "Ready-to-cook poultry" means any dressed poultry from which the protruding pinfeathers, vestigial feathers (hair or down as the case may be), head, shanks, crop, oil gland, trachea, esophagus, entrails, reproductive organs and lungs have been removed, and with or without the giblets, is ready to cook without need of further processing. Ready-to-cook poultry also means any cut-up or disjointed portion of poultry or any edible part thereof, as described in this paragraph.

Regulations. "Regulations" means the provisions of this entire part.

Secretary. "Secretary" means the Secretary of the Department, or any other officer or employee of the Department to whom there has heretofore been delegated or to whom there may hereafter be delegated, the authority to act in his stead.

Shipping container. "Shipping container" means any container used or intended for use in packaging the product packed in an immediate container.

Slaughter. "Slaughter" means the act of killing poultry for human food in accordance with good commercial prac-

tices in a manner which will result in thorough bleeding of the carcasses.

Unwholesome. "Unwholesome" means:

(1) Unsound, injurious to health, or otherwise rendered unfit for human food.

(2) Consisting in whole or in part of any filthy, putrid, or decomposed substance.

(3) Processed, prepared, packed, or held under unsanitary conditions whereby a poultry carcass or parts thereof or any poultry product may have become contaminated with filth or whereby a poultry product may have been rendered injurious to health.

(4) Produced in whole or in part from poultry which has died otherwise than by slaughter.

(5) Packaged in a container composed of any poisonous or deleterious substance which may render the contents injurious to health.

Wholesome. "Wholesome" means sound, healthful, clean, and otherwise fit for human food.

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ADMINISTRATION

§81.3 *Administration.* The Administrator shall perform, for and under the supervision of the Secretary, such duties as are prescribed in the regulations in this part and as the Secretary may require in the administration of the regulations in this part. The Administrator is authorized to waive for limited periods any particular provisions of the regula-

tions to permit experimentation so that new procedures, equipment and processing techniques may be tested to facilitate definite improvements: *Provided,* That such variations from the provisions of the regulations are not in conflict with the purposes of the act. The Administrator is authorized to grant exemptions in accordance with the provisions of the act.

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§81.7 *Poultry and poultry products entering or prepared in official establishments.*

All poultry and poultry products processed in an official establishment shall be inspected, handled, prepared, marked and labeled as required by the regulations in this part, and all dressed poultry and poultry products entering an official establishment shall have been inspected and shall be marked as required by the regulations in this part.

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LABELING

§81.125 *Containers of poultry required to be labeled.*

Except as may be authorized by the Administrator with respect to shipment of products between official establishments, each shipping container and each immediate container of any product shall at the time it leaves the official establishment bear approved labels containing information in accordance with the provisions set forth in §§81.126 to 81.146, inclusive, and the act.

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§81.127 *Labels to be approved by the Administrator.* No label, except printer's proofs bearing official identification shall be printed until the printer's proof or a photostatic

copy has been found by the Administrator to be acceptable; and no label or imprint bearing official identification shall be used until finished copies or samples thereof have been approved by the Administrator, except that approval may be given to printer's final proofs or photostatic copies of labels or samples of stenciled and rubber stamped imprints for shipping containers or containers for institutional packs, and no such labels or imprints shall be used until such proofs or copies have been approved by the Administrator.

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§81.130 *Wording on labels.* (a) Each label approved for use on an immediate container for poultry products shall bear in distinctly legible form the following information:

(1) The common or usual name of the poultry product.

(2) A statement of ingredients if fabricated from two or more ingredients, including a declaration as to artificial flavors, colors, or preservatives, if any. Such ingredients shall be listed by their common or usual names in the order of their descending proportions. For the purpose of this paragraph, the term "chicken meat," unless modified by an appropriate adjective, is construed to mean deboned white and dark meat; whereas, the term "chicken" may include other edible parts such as skin and fat not in excess of their natural proportions, in addition to the chicken meat. If the term "chicken meat" is listed and the product also contains skin, giblets, or fat, it is necessary to list each such ingredient. This terminology shall apply to poultry products prepared from other kinds of poultry where applicable.

(3) The net weight or other appropriate measure of the contents, except that the Administrator may approve the

use of labels for certain types of immediate containers which do not bear the net weight: *Provided,* That the retailer or distributor supplying the retailer agrees in writing to the Administrator to mark the true net weight on the label prior to display and sale thereof: *And provided further,* That the shipping container bears a statement "Net weight to be marked on consumer packages prior to display and sale": *And provided further,* That the total net weight of the contents of the shipping container shall be marked on such container. The net weight marked on immediate containers of poultry products shall be the net weight of the poultry and shall not include the weights of the wet or dry packaging materials and giblet wrapping materials.

(4) The name and address of the packer or distributor and when the name of the distributor is shown, it shall be qualified by such term as "packed for," "distributed by," or "distributors."

(5) The official inspection mark.

(6) The plant number of the official establishment in which the product was inspected, either within the official inspection mark or clearly visible and in close proximity elsewhere on the exterior of the container, or in the case of canned product, the plant number may be embossed on the lid of each can. In the case of nontransparent consumer packages such as cartons, the plant number may be legibly printed thereon or it may be shown on an insert label placed on top of the product within the package. In the case of transparent wrappers, the plant number may be shown on an insert label and so placed under the transparent covering that it will be clearly visible and legible.

(b) Each label approved for use on a shipping container shall bear in distinctly legible form the following information:

(1) The official inspection mark.

(2) The plant number of the official establishment in which the product was inspected, either within the official inspection mark, or elsewhere on the container clearly visible and in close proximity to the official inspection mark.

(c) Any label which bears the official inspection mark or any written, printed or graphic matter upon or accompanying any poultry product inspected or required to be inspected pursuant to the provisions of the regulations shall not bear any statement that is false or misleading. If the Administrator has reason to believe that any label in use or prepared for use is false or misleading in any particular, he may direct that the use of the label be withheld unless it is modified in such manner as the Administrator may prescribe so that it will not be false or misleading. If the person using or proposing to use the label does not accept the determination of the Administrator, he may request a hearing, but the use of the label shall, if the Administrator so directs, be withheld pending hearing and final determination by the Administrator. Any person so denied the approval of any label shall be notified promptly of the reasons for the denial. A written application for a hearing with respect to the denial may be filed by said person with the Administrator within 10 days after notice of the denial. Such petition shall state specifically the errors alleged to have been made by the Administrator in denying approval of the label. After consideration of the facts adduced at the hearing, any determination with respect to the matter

by the Administrator shall be conclusive unless, within 30 days after the receipt of notice of such final determination, the person adversely affected thereby appeals to the United States Court of Appeals for the Circuit in which he has his principal place of business, or to the United States Court of Appeals for the District of Columbia Circuit. The provisions of section 204 of the Packers and Stockyards Act of 1921, as amended, shall be applicable to appeals taken under this section.

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Agricultural and Markets Law of the State of New York

§193. *Method of sale of food and food products*

1. Definition of "food" and "food product". The terms "food" and "food product" as used in this section shall include all material, solid, liquid or mixed, whether simple or compound, used or intended for consumption by human beings or domestic animals normally kept as household pets and shall also include all substances or ingredients to be added thereto for any purpose.

2. All food and food products which are sold, offered or exposed for sale by wholesalers, packers, distributors or jobbers shall be sold or offered for sale by net weight, numerical count or standard measure, whichever term shall be applicable, and shall be plainly marked by such person or persons offering the food or food products for sale, in such form or manner as may be prescribed by the commissioner, except that it shall not be necessary to so mark meat, meat products or fish, except shellfish in natural form, provided the net weight be stated on a written invoice and on the shipping container of the meat, meat product or fish.

3. All food and food products offered for sale at retail and not in containers shall be sold or offered for sale by net weight, standard measure or numerical count under such regulations as may be prescribed by the commissioner.

4. All food and food products which are packaged or wrapped by the retailer in advance of being exposed or offered for sale by the retailer shall be accurately marked in such form or manner as may be prescribed by the commissioner, with (a) the net weight or standard measure

or numerical count; (b) the selling price per pound or unit of standard measure, and (c) the total selling price.

5. Wherever food or food products are packaged or wrapped for sale by a retailer in advance of being sold or offered for sale, an accurate computing scale shall be maintained so placed as to be easily available to customers.

6. This section shall not apply to sales of (a) eggs, fresh fruits, fresh vegetables, grains and nuts; (b) milk and cream as set forth in section one hundred ninety-one of this chapter; (c) malt beverages as set forth in section one hundred ninety-two-c of this chapter; (d) bread, as set forth in section one hundred ninety-three-a of this chapter; (e) frozen desserts as set forth in section one hundred ninety-three-d of this chapter; (f) alcoholic beverages; and (g) drugs and pharmaceuticals. Added L. 1962, c. 770, §2; amended L. 1963, c. 377, eff. April 16, 1963.

New York State Regulations

STATE OF NEW YORK

DEPARTMENT OF AGRICULTURE AND MARKETS

WEIGHTS AND MEASURES MANUAL—Circular 834

221.9. METHOD OF SALE OF SPECIFIC COMMODITIES

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(c) *Meat, poultry and fish.* Except for immediate consumption on the premises where sold or as one of several elements comprising a ready-to-eat meal sold as a unit for consumption elsewhere than on the premises where sold, all meat, meat food products, poultry (whole or parts) and all seafood except shellfish, offered or exposed for sale or sold, as food shall be offered or exposed for sale and sold by net weight. The meaning of the words meat and meat food products as used in this section is that defined in Section 96-g of the Agriculture and Markets Law.

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221.40. MEAT, POULTRY AND FISH. Meat, poultry and fish shall be sold or offered for sale as food at retail by net weight only.